APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 22, 1997

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Samuel L. Day,

Plaintiff-Appellant,

versus

Liberty National Life Insurance Company,

Defendant-Appellee.

No. 96-2927

Appeal from the United States District Court for the Northern District of Florida. (No. 94-50124/RV). Roger Vinson, Judge.

Before, CARNES, Circuit Judge, and HENDERSON and FLOYD R. GIBSON,* Senior Circuit Judges.

PER CURIAM

Samuel L. Day filed this action pursuant to the Age Discrimination in Employment Act ("ADEA")[1] charging that

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] 29 U.S.C. § 621 et seq.

the defendant, Liberty National Life Insurance Company ("Liberty"), discriminated against him because of his age when it terminated his employment. Following a mistrial, the jury in the second trial concluded that age was a determining factor in Liberty's decision to discharge Day and awarded him $300,000.00 in back pay and compensatory damages. The jury also found, however that there was no willful violation of the ADEA by the company. Liberty then filed a motion to alter or amend the judgment, contending for the first time that Day's recovery of compensatory damages alone was barred by the statute of limitations. The district court granted the motion and entered a judgment for Liberty. Day filed this timely appeal from that judgment. For the reasons that follow, we reverse the order of the district court and direct that the jury's award be reinstated.

I. FACTS

Day was born in January, 1939 and began working for Liberty in March of 1970 as a sales agent. He received many honors over the term of his employment for his sales production. In the years just before his termination in May, 1991, however, Day claims to have been negatively impacted by company policies and attitudes against older employees. Jack Brown, President of Liberty, took responsibility for Day's dismissal, giving as the reason his high claims loss ratio. Day was never warned of the company's dissatisfaction with that or any other problem nor was he given any training to correct any perceived deficiencies in his performance prior to his termination.

Day filed this action *pro se* on April 29, 1994. The

complaint alleged in part: "Plaintiff received a determination three days before his two year statute expired stating that he had three years to file a lawsuit. Plaintiff brings this lawsuit within three years of the discriminatory discharge to challenge intentional and willful violations" of the ADEA.[2] In its answer, Liberty asserted several affirmative defenses but did not plead the statute of limitations as an affirmative defense.[3] At the time of the events giving rise to this litigation, the ADEA incorporated the two-tiered statute of limitations contained in the Portal-to-Portal Pay Act of 1947. *See* 29 U.S.C. § 626(e)(1). That statute provided that an action would be "forever barred unless commenced within two years after the cause of action accrued. . . ." 29 U.S.C. § 255(a). Day filed this suit more than two years but less than three years after his cause of action arose.

Prior to the first trial, the parties filed a joint pretrial stipulation of all the legal and factual issues to be decided by the court and jury. Liberty did not raise any issue which could be construed as a limitations defense. The first proceeding ended in a mistrial after the jury failed to reach a verdict. In the two months intervening between the first and second trial of the case, Liberty did not move to amend the pretrial stipulation or file any other pleading invoking a statute of limitations defense. At the conclusion of the second trial, the jury returned a special verdict finding that "age was a determining factor" in the termination of Day's employment and awarded Day

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[2] R.1-1, Complaint at ¶ 2.

[3] R.1-3, Answer and Affirmative Defenses at ¶¶ 16-17.

$300,000.00 in back pay and compensatory damages. In response to a third interrogatory, the jury found that Liberty's violation of the ADEA was not willful. A notation under that question on the verdict form informed the jury that "[i]f you answer 'Yes,' the Court will double the amount of damages you found in Question No. 2."

After the jury returned its verdict, Liberty for the first time suggested to the district court that the jury's finding that the violation was not willful barred any recovery by Day under the two-year statute of limitations for non-willful violations of the ADEA. The transcript reveals that both the district court and plaintiff's counsel were surprised by this assertion, and that the court told the parties to brief the issue. The district court then entered a final judgment in Day's favor for $300,000.00 in accordance with the jury's verdict.

Liberty subsequently filed a Fed.R.Civ.P. 59 motion to alter or amend the judgment, arguing that any recovery was barred by the statute of limitations. Day also filed a Rule 59 motion, urging that the jury's finding of non-willfulness was against the great weight of the evidence and that he was entitled to have the compensatory damages awarded by the jury doubled by the court.[4]

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[4] In his motion to alter or amend, Day also contended that the jury instructions and verdict form were in error since the notation following the third question informed the jury that a "yes" answer would lead to a doubling of the amount awarded in response to the second question but did not advise the jury that a "no" answer would lead to no recovery by Day. The district court rejected this contention on the ground that "the plaintiff did not object to the instructions or verdict form at trial. . . ." (Order dated June 12, 1996 at 4).

II. STANDARD OF REVIEW

We review the district court's grant of a Rule 59 motion for an abuse of discretion. *See, e.g., Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993).

III. DISCUSSION

A. Statute of Limitations.

On appeal, Day alleges that the district court abused its discretion in granting Liberty's motion to alter or amend based on the two-year limitations period. He argues that Liberty waived the statute of limitations defense because it was not asserted in its answer to the complaint or at any other point in the first or second trial before the jury returned its verdict in his favor. He notes that Liberty did not refer to any limitations problem in its pretrial stipulations or make any motions during trial based on his failure to file within the limitations period.

Liberty concedes that it did not raise the limitations

On appeal, Day claims that he did preserve his objection to the jury instructions. The transcript of the jury charge conference discloses that Day did object to the jury verdict form, specifically to the notation following the third question that damages would be doubled if the jury found that Liberty acted willfully. The district court overruled Day's objection to the text of the verdict form. While Day is thus correct about this point, he does not tie it to any specific requested relief. Given that we are reinstating the jury's verdict, it is not necessary to further address this question.

defense but points out that Day's complaint specifically stated that it was brought within three years seeking redress for intentional and willful violations of the ADEA. Therefore, according to Liberty, proving that it acted willfully was an element of Day's cause of action. That issue was submitted to the jury, and the jury decided it adversely to Day.

The statute of limitations is an affirmative defense which must be specifically pled. Fed.R.Civ.P. 8(c). This court has held in a number of discrimination actions that failure to plead the bar of the statute of limitations constitutes a waiver of the defense. *See, e.g., E.E.O.C. v. White & Son Enterprises*, 881 F.2d 1006, 1009 (11th Cir. 1989)(statute of limitations must be expressly pleaded and included in pretrial order or it is waived). Thus, in *Paetz v. U.S.*, 795 F.2d 1533, 1536 (11th Cir. 1986), a panel of this court ruled that the government's failure to interpose the statute of limitations constituted waiver of the defense. According to the court, "[w]e need not determine the date on which the applicable statute of limitations began to run. A statute of limitations defense is an affirmative defense.... The government did not plead a statute of limitations defense in 1975; the defense is waived." *Id.* (citations omitted).

Liberty denies that its failure to raise the statute of limitations in a timely fashion prejudiced Day because the complaint itself interjected the issue into the case. This assertion is without merit. First, Day's complaint was drafted and filed *pro se* by someone who clearly had no legal training. Furthermore, regardless of the allegations of a complaint, the federal rules specifically require that the affirmative defense of the statute of limitations be separately pled. At no point from

the filing of the complaint until the return of the jury's verdict in the second trial did Liberty even suggest that it was relying on a limitations defense or that Day's recovery would be barred unless he established a willful violation of the ADEA. In its trial brief and other filings, Liberty suggested that willfulness was relevant only to determining whether Day was entitled to liquidated damages.

The Seventh Circuit Court of Appeals considered a similar problem involving the ADEA's two-tiered limitations period in *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985). In that case, the County pled the statute of limitations in its answer but did not allude to the matter again in the district court. The County attempted to raise it before the appellate court which rejected the effort. Of particular importance to the court was the fact that "had the plaintiffs known that this statute of limitations was in play they might have presented evidence in the district court to show that the defendants had tolled it. . . ." *Id.* at 1197. Similarly, in this case, if Liberty had brought the limitations issue to the attention of the court during the second trial, Day could have offered evidence that the statute was tolled during some period of time or have insisted that the jury instructions reflect the effect of the statute of limitations on any possible recovery by him. Since Liberty did not refer to the limitations question until after the jury returned its verdict, those options were not available to Day.

While there does not appear to be any case where this court has reviewed a district court order permitting a defendant to assert a statute of limitations defense after a jury verdict, this

court's predecessor affirmed a district court's rejection of such an effort. In an early age discrimination case, the defendant raised the statute of limitations for the first time in a motion for judgment notwithstanding the verdict. *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979). The former Fifth Circuit Court of Appeals noted that "[a]ppellant did not raise the defense in its pleadings or in objection to the court's jury instructions. . . . Consequently, appellant has waived any objection to the limitations period." *Id.* at 134. The circumstances in this case are virtually the same. Accordingly, the district court erred in granting Liberty's Rule 59 motion.[5]

B. Liquidated Damages.

Day also appeals the district court's denial of his motion to alter or amend the judgment to award liquidated damages based on the jury's finding that his dismissal by Liberty was not willful.

Under the ADEA, an employee is entitled to liquidated damages only for a willful violation of the statute. Willfulness

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[5] We note also that it is the law of this circuit that a defendant can waive a potentially viable defense by failing to ensure that the issue is clearly preserved in the pretrial order. *See Hodges v. United States*, 597 F.2d 1014, 1017 (5th Cir. 1979). This court recently held that a municipal defendant in a civil rights case could not avail itself of the defense provided by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a city may not be liable unless the individually named defendant is the final policymaker with respect to that issue, when the city did not preserve the issue for trial in the district court. *Morro v. City of Birmingham*, 117 F.3d 508 (11th Cir. 1997). This was true even though the court had "little doubt that the City would be entitled to escape the judgment against it on that basis." *Id.* t 515.

exists when the employer knew its conduct was prohibited or showed reckless disregard for whether its conduct was prohibited by the ADEA. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Generally, willfulness is a question of fact for the jury, and the jury's finding on that issue is not to be readily disturbed. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

Day maintains that the evidence shows that Liberty pursued discriminatory policies based on age. The evidence in the record before us leaves room for reasonable minds to differ and does not appear to establish that point conclusively. The jury heard that evidence and reached the contrary determination. The district court did not err in refusing to overturn that finding and award Day liquidated damages.

Accordingly, that portion of the district court's order granting Liberty's motion to alter or amend is REVERSED and the portion of the order denying Day's motion is AFFIRMED. We reinstate the jury verdict of an ADEA violation and its award of back pay and compensatory damages in favor of Day. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d at 1563.

REVERSED in part and AFFIRMED in part.

APPENDIX B
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ENTERED JUNE 12, 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SAMUEL L. DAY,

Plaintiff,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

Case No. 94-50124-RV

ORDER

Pending is the motion of defendant Liberty National Life Insurance Company to alter or amend the judgment, or in the alternative, for a new trial. (doc. 84) Also pending is the defendant's motion for judgment on the verdict (doc. 80), the plaintiff's motion for attorney's fees and costs (doc. 82), and the plaintiff's motion to alter or amend the judgment. (doc. 83)

I. BACKGROUND

Plaintiff Samuel L. Day filed this action on April 29, 1994, alleging that the defendant, Liberty National Life

Insurance Company, discriminated against him on the basis of age when it terminated his employment. The first trial resulted in a hung jury, and the case was retired on March 25-27, 1996. The special verdict form asked the jury to decide whether the defendant intentionally discriminated against the plaintiff, and if so, whether such discrimination was willful. The jury found that the defendant did in fact discriminate against the plaintiff, but that such discrimination was not willful. (doc. 74) The jury awarded damages in the amount of $300,000.

After the acceptance of the verdict, the defendant raised the issue of the applicability of the statute of limitations, in light of the absence of a finding of willfulness. The parties were directed to file memoranda of law on the issue of whether the plaintiff should be precluded from any recovery against the defendant based on the statute of limitations. Now under consideration are the motions resulting from the defendant's assertion of the statute of limitations.

II. DISCUSSION

A. Statute of Limitations

The defendant contends that since the jury determined that the defendants did not willfully violate the ADEA, the plaintiff is barred from recovery by the applicable statute of limitations. The plaintiff contends that the defendant waived its right to assert the statute of limitations by failing to raise the affirmative defense in its answer, and by failing to assert the defense in the pretrial stipulation, in the trial brief, or during the trial.

Appendix B

The provisions of Title 29, United States Code, Section 255 are applicable to actions brought under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. 626(e). Under Section 255, an action must be commenced within two years after the accrual of the cause of action, unless the violation of the ADEA was willful, in which case the period is extended to three years. 29 U.S.C. § 255(a).

The complaint in this case was filed on April 26, 1994. Day's cause of action under the ADEA had accrued at least by October 8, 1991, the date on which he filed a charge of discrimination with the EEOC. Accordingly, the complaint was filed after two years, but within three years, of the accrual of the cause of action. Since the three year period of Section 255 only applies where the discrimination is willful, the jury's finding of no willfulness made the plaintiff's action untimely under the two year period.

As noted by the plaintiff, the defendant did not raise the statute of limitations as an affirmative defense in its answer, and did not address the limitations issue in the pretrial stipulation, in its trial brief, or at trial. Instead, the plaintiff raised the issue in his complaint, stating that his action was brought within the three year statutory period. The plaintiff argues that the defendant, by its inaction, has waived the staute of limitations defense.

Federal Rule of Civil Procedure 8(c) requires that the affirmative defense of a statute of limitations be set out in the responsive pleading. In most cases, the failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. E.E.O.C. v. White & Son Enterprises,

881 F.2d 1006 (11th Cir. 1989); American National Bank v. FDIC, 710 F.2d 1528 (11th Cir. 1983). See Wright & Miller, Federal Practice & Procedure § 1278, at p. 477. However, "[t]he purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it." Hassan v. United States Postal Service, 842 F.2d 260, 263 (11th Cir. 1988). When the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue. Id.; Jones v. Miles, 656 F.2d 103, 107 n.7 (5th Cir. Unit B 1981).

The difficulty here is that Section 255 does not function like the typical statute of limitations. Unlike the typical statute of limitations, which establishes a clear dividing line for filing claims, the applicable period under Section 255 depends on resolution of the issue of willfulness, a factual question to be submitted to the jury. Fowler v. Land Management Grolupe, Inc., 978 F.2d 158, 163 (4th Cir. 1992). In this case, the parties were aware at all stages of the case that the question of willfulness was one that would have to be resolved by the jury. Since the plaintiff had notice of the potential limitations problem under Section 255, and of the necessary factual determination to be made on the willfulness issue, the defendant did not waive the limitations issue.[1]

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[1] The plaintiff relies upon Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984), where the defendant was held to have forfeited its statute of limitations defense. Id. at 1196. Heiar is not applicable here, however, since it dealt with a situation where the defendant first raised the defense on appeal.

Appendix B

B. Jury Instructions and Verdict Form

The plaintiff contends that the jury instructions were in error, as the jury should have been informed that the plaintiff would recover nothing in the absence of a finding of willfulness. The plaintiff also contends that since the defendant failed to object to the instructions and the special verdict form, which both contemplated that a finding of intentional discrimination would result in an award of damages, the defendant waived its right to rely upon the statute of limitations.

Because of the nature of the statute of limitations provided in Section 255, the jury was required to determine: (1) whether the defendant discriminated against the plaintiff on the basis of his age; and (2) whether the discrimination was willful. The defendant was not required to object to the instructions or verdict form, since the determinations made by the jury were essential to resolving the limitations issue. As to the plaintiff's argument that the jury should have been informed that the plaintiff would recover nothing in the absence of a finding of willfulness, the plaintiff did not object to the instructions or verdict form at trial, although he was aware that the statute of limitations posed a potential problem. Further, such an instruction would have been prejudicial to the defendant. Even more importantly, neither side advised me that there was a pending statute of limitations issue which would be resolved by the jury's verdict on the willfulness. Therefore, I had no way to anticipate and avoid the potential problem or to have prepared different instructions or a different verdict form.

C. Willfulness

Finally, the plaintiff contends that the finding of the jury that the intentional discrimination of the defendant was not willful is against the great weight of the evidence, and that liquidated damages should be awarded.

A motion to amend or set aside judgment may only be granted if the movant shows there was a mistake of law or fact, or presents newly discovered evidence that could not have been discovered previously. Deutsch v. Burlington Northern R. Co., 983 F.2d 741 (7th Cir. 1993). Such a motion may not be granted "where to do so would undermine the jury's fact-finding role and trample on the defendant's seventh amendment right to a jury." Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 473 (2d Cir. 1985); Robinson v. Watts Detective Agency, 685 F.2d 729, 742 (1st Cir. 1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 728, 74 L.Ed.2d 953 (1983).

Under the ADEA, an employee is entitled to double damages when the employer's discriminatory conduct is willful. 29 U.S.C. § 626(b). The double recovery is punitive and is intended to deter willful conduct. Trans World airlines, Inc. v. Thurston, 469 U.S. 111, 125-26, 105 S.Ct. 613, 623-24, 83 L.Ed.2d 523 (1985). The Supreme Court has defined a willful violation of the ADEA as one in which the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Hazen Paper Co. v. Biggins, ___ U.S. ___, 113 S.Ct. 1701, 1708, 123 L.Ed.2d 338 (1993) (citation omitted). "Thus, an employer who has engaged in conduct that violates the ADEA, but did not know (and was not reckless in its ignorance) that the conduct would

violate the ADEA, will be liable only for a nonwillful violation and will not be subject to liquidated damages." Peterson v. Ins.

Co. of North America, 40 F.3d 26, 31 (2nd Cir. 1994). See Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 722 (1st Cir. 1994).

The plaintiff argues that since the jury found that age was a determinative factor in the defendant's decision to terminate the plaintiff, the only possible conclusion is that the defendant's conduct was willful. However, in assessing willfulness, the jury does not consider whether the employer's conduct is intentional or deliberate, since such a finding must be made in any event. Peterson v. Ins. Co. of North America, 40 F.3d 26, 31 (2nd Cir. 1994). Although, as the plaintiff notes, the defendant stated in the pretrial stipulation that it had been aware of the ADEA and its requirements, a finding of willfulness "requires something more than merely showing that an employer knew about the ADEA and its potential applicability in the workplace." Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721 (1st Cir. 1994). See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 127, 105 S.Ct. 613, 625, 83 L.Ed.2d 523 (1985). Here, the issues of intent and willfulness were hotly contested at trial. The plaintiff and the defendant presented conflicting evidence on both issues, and the jury, in its role as finder of fact, found that the defendant did not willfully violate the ADEA. Since the plaintiff has not shown that there was a mistake of law or fact resulting in the jury's determination, the plaintiff's motion to alter or amend the judgment is DENIED.

Appendix B

III. CONCLUSION

For the reasons discussed above, the defendant's motion to alter or amend the judgment is GRANTED. (doc. 84) The plaintiff's motion for attorney's fees and costs is DENIED. (doc. 82) The plaintiff's motion to alter or amend the judgment is DENIED. (doc. 83) The defendant's motion for judgment on the verdict is DENIED as moot. (doc. 80) The Clerk is directed to enter judgment for the defendant, together with taxable costs.

DONE AND ORDERED this 12th day of June, 1996.

/s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX C
ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RESPECTING PETITIONER'S PETITION FOR REHEARING, FILED DECEMBER 10, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2927

SAMUEL L. DAY,

Plaintiff-Appellant,

versus

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d___).

Before: CARNES, Circuit Judge, HENDERSON and GIBSON*, Senior Circuit Judges.

Appendix C

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Proceduire; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd T. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2927

SAMUEL L. DAY,

Plaintiff-Appellant,

versus

LIBERTY NATIONAL LIFE
INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Florida

Before: CARNES, Circuit Judge, HENDERSON and GIBSON*, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellee, Liberty National Life Insurance Company, Inc., is DENIED.

ENTERED FOR THE COURT:

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd T. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX D
PLAINTIFF'S COMPLAINT
FILED APRIL 29, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

SAMUEL L. DAY	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	CV-
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY	)	
	)	
Defendants.	)	

COMPLAINT

I. JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331, 1343(4), the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.

2. Plaintiff has fulfilled all conditions precedent to the institution of this action under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. Plaintiff timely filed his charge of age discrimination within 180 days of occurrence of the last discriminatory act. Plaintiff filed his charges with the state agency. Plaintiff received a determination three days before his two year statute expired stating that he had three years to file a lawsuit. Plaintiff brings this lawsuit within three

years of the discriminatory discharge to challenge intentional and willful violations of the Age Discrimination and Employment Act.

II. PARTIES

3. Plaintiff, Samuel L. Day, is a citizen of the United States of America and a resident of Panama City. His date of birth is 01/22/39.

4. Defendant, Liberty National Life Insurance Co., is subject to suit under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. The defendants employ at least twenty (20) persons.

III. CAUSES OF ACTION

5. The plaintiff re-alleges and incorporates by reference paragraphs 1-4 above with the same force and effect as if fully set out in specific detail hereinabove.

6. The defendants discriminate on the basis of age against the plaintiff with respect to employment opportunities, including but not limited to, discharge, hiring, layoff, recall, transfer and termination.

7. The plaintiff was subjected to unequal treatment on account of his age regarding the defendant's decision to terminate Mr. Day.

8. Mr. Day was employed by the defendant continuously from 1970 until 1991.

9. Mr. Day had an excellent sales record with the defendant. He has won numerous sales awards.

10. In January 1991, Liberty National instituted a new method of evaluation of employees. The new performance measurement compared premiums earned by the agent to the claims that would have to be paid by the company.

11. Unfortunately for Mr. Day a number of his clients became sick and had untimely deaths. The company had to pay out claims on Mr. Days (sic) clients, and as a result terminate him. Mr. Day believes that his termination is a pretext for age discrimination. Mr. Day was 2 ½ years away from retirement with a substantial pension.

12. Mr. Day had developed a substantial route business that involved the collection of premiums. Upon his termination the company could turn over the business to a younger employee who would not earn the same commission.

13. Three weeks prior to his termination Mr. Day was selected to go to the "Torch Convention" a sales meeting of the company's most successful insurance representatives.

14. Upon information and belief the company used the new evaluation system solely for the purpose of eliminating Mr. Day. The new evaluation system was not applied to younger employees in a manner that resulted in termination.

COUNT I

15. The defendant has intentionally discriminated

against the plaintiff on account of his age in violation of 29 U.S.C. § 621 et. seq. (sic). The plaintiff seeks back pay, injunctive relief, punitive damages, and liquidated damages.

IV. PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the defendant is violative of the rights of the plaintiff as secured under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq; and

2. Grant plaintiff a permanent injunction enjoining the defendant, its agents, successors, employees from continuing to retaliate against the plaintiff and to violate 29 U.S.C. §621 et seq, the Age Discrimination in Employment Act; and

3. Enter an Order requiring the defendants to make the plaintiff whole by reinstating him to a comparable position he would have occupied in the absence of age discrimination, including backpay (plus interest), compensatory and punitive damages, liquidated damages, lost seniority, benefits, and loss of pension;

4. The plaintiff further prays for such other relief and benefits as the cause of justice may require, including, but not limited to, an award of costs, attorneys' fees and expenses.

Respectfully submitted,

Appendix D

Samuel L. Day
1120 Tennessee Ave
Lynn Haven Florida 32444

PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY ON THOSE ISSUES TRIABLE BY JURY.

Samuel L. Day

DEFENDANT ADDRESSES:

Liberty National
1900 Liberty Lane
Panama City, Florida 32405